Supreme Court, U.S.
FILED

951579 APR - 1 1996

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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN G. PRICE AND
DAVID G. PRICE,

PETITIONERS,

V.

THE UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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120 pp

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals is in conflict with *Jacobson v. United States*, 503 U.S. 540 (1992), by the court below holding that predisposition is proved with a showing that one is ready and willing to commit an offense after government contact in a federal prosecution where entrapment is a defense and government inducement is shown and whether there is confusion among the circuits with respect to proving predisposition by merely showing a general disposition, prior to any government contact, to commit an offense different from that charged.

2. Whether a federal court's procedure and manner of conducting a post verdict jury investigation regarding juror misconduct and bias and its finding of no prejudice conflicts directly or in principle with *Smith v. Phillips*, 455 U.S. 209 (1982), *Remmer v. United States*, 347 U.S.227 (1954) and *United States v. Wood*, 299 U.S. 123 (1936), thereby violating petitioners' rights to due process, to a fair and impartial jury and to the effective assistance of counsel.

3. Where a federal court admits the *Attorney General's Guidelines on FBI Undercover Operations* during cross examination in a case where entrapment is the defense and those Guidelines are relevant to the issues of inducement and predisposition and at the government's untimely request, after the close of all evidence, orders them removed from evidence and prohibits any argument about them is an important question of federal law that has not been, but

should be, settled by the court.

4. Where there is a conflict among the Courts of Appeal of various circuits regarding whether a prospective cost of incarceration fine levied pursuant to U.S.S.G. §5E1.2(i) in addition to an imposed punitive fine is excessive under the Eighth Amendment or violative of the right to due process under the Fifth Amendment, or not rationally related to the purposes of the Sentencing Reform Act, this Court should resolve this conflict that is expected to cause continuing confusion.

5. Whether the district court's failure to recuse itself in the face of purported threats allegedly made by one of the petitioners and disclosed to the parties on the eve of sentencing is in conflict, either directly or in principle, with *Liteky v. United States*, ___ U.S. ___, 114 S.Ct. 1147 (1994).

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All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The U.S. District Court, Middle District of Alabama, by unpublished opinion, denied petitioners' motion for new trial (Appendix A). The opinion of the U.S. Court of Appeals appears at Appendix B to the petition and is reported at 65 F.3d 903 (11th Cir. 1995).

JURISDICTION

The judgment of the Court of Appeals was entered on September 29, 1995. A timely petition for rehearing was denied on January 3, 1996, and appears at Appendix C. The court of appeals on January 30, 1996, entered an order of recall and stay of the mandate pending petition for writ of certiorari (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution (Appendix E), Sixth Amendment, United States Constitution

(Appendix F), Eighth Amendment, United States Constitution (Appendix G), Local Rule 9 of the United States District Court for the Middle District of Alabama, (Appendix H), U.S.S.G. § 5K1.2(i) (Appendix I), 18 U.S.C. § 3553 (Appendix J), 18 U.S.C. § 3572 (Appendix K), 28 U.S.C. § 994(y) (Appendix L).

STATEMENT OF THE CASE

Petitioners John and David Price, (ages 63 and 41 respectfully at the time of arrest), are father and son. John Price was president of Price Rubber Corporation headquartered in Montgomery, Alabama. David was an employee and ran the Arlington, Texas operation. Prior to this offense neither had ever been involved in any criminal offense.

This case arose out of a government sting operation orchestrated by a large scale drug smuggler turned government operative who was facing the possibility of life in prison. The operative was Bobby Price, Jr., who is no relation to the petitioners but was acquainted with them because he was a former employee.

On July 8, 1991, Bobby Price, Jr., was arrested and subsequently indicted in the Middle District of Alabama for a drug distribution conspiracy. Five days later he became a government agent by entering into a cooperation agreement in order to reduce his sentencing exposure and to be released on bail, after first being detained pursuant to 18 U.S.C. §3142(e).

The government agent provided over 100 names to investigators for possible drug prosecution before targeting defendants John and David Price. The informant had prior knowledge of the personalities of the petitioners and of the legal problems and other events they had experienced. There were numerous instances of the government agent's attempts to persuade or pressure petitioners to commit the charged offense. *United States v. Price*, 65 F.3d 903, 908 (11th Cir. 1995).

After becoming a government agent, Bobby Price, Jr. was strapped for funds to pay his lawyers. He deceptively prevailed upon John Price to contribute to his legal defense but the informant converted most of the funds to his personal use instead, thus obtaining money by false pretenses.

Following his release from detention and the commencement of his service as a government agent, the operative had several meetings with petitioners. The first recorded meeting with John Price was on audio tape and did not occur until August 21, 1992, and the first recorded meeting with David Price occurred on September 16, 1992. During the August 21 meeting John Price consistently disavowed interest in having anyone killed. That disavowal persisted despite the informant's urging for him to go along with killings. The government agent told John Price, "there are people that don't deserve to live and these [purported victims] are two that don't." The operative further pushed John Price to adopt his plan by telling him that he [the

informant] would have "a hard time sleeping at night knowing that there was some son of a bitch out walkin'(sic) around that had caused..." him aggravation. Immediately prior to the September 16, 1992, meeting with David Price and the undercover FBI agents, the operative frightened David Price by instructing him not to talk to the "hit men" agents about anything less than terminal (murder) or David Price would be harmed.

Unbeknownst to the government, Bobby Price, Jr. kept a diary of most of his activities as an agent. The diary was presented by Bobby Price, Jr. to his sentencing judge as a truthful compendium of the time spent and activities in which he engaged as a government agent to expand upon the government's motion for downward departure under U.S.S.G. §5K1.1. [1] In that diary he stated that his

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[1] While Bobby Price, Jr. presented his diary to Judge Truman Hobbs for the court to rely upon as truthful at his sentencing, by the time of petitioners' trial the diary became a "pack of lies" explained as emotional ramblings. The operative never informed Judge Hobbs that the diary he submitted was perjured testimony. He also admitted to telling a great many lies throughout his and these proceedings. Nevertheless, he received the benefits of the government's §5K1.1 motion and a Fed.R.Crim.P. 35(b) motion made by the government after petitioners' trial was concluded. Unfortunately, how fruitful the 35(b) motion was for the government's agent is unknown, for it was placed under seal.

The operative's attitude toward the truth is best described in his own words: "I guess the -- in one sense you can look at it and it is a lie because it is not a truth..." and that when he tells lies, he tells them for "[n]o particular reason."

government handlers were upset with the results of his August 21 meeting with John Price because he had not gotten John Price to say that he wanted murder for hire. The operative's attorney kept notes regarding his conversations with his client and testified that Bobby Price, Jr. told counsel that his handlers informed him that "hire for hurt" was not a federal crime and was not "good enough", thus corroborating the informant's diary entry. There were also diary entries made by the informant stating that his handlers believed he may have been entrapping people.

The September 16, 1992, meeting involved the government operative, the undercover agents and David G. Price, to whom the agents were introduced by the informant. During a wide ranging discussion the undercover agents informed David Price that people could be killed for a certain price. David Price was intoxicated during that conversation and later, in a conversation held only between David Price and the operative, it was shown that the meeting with the agents had been preceded by directions from the informant about what to say to the agents, i.e., don't talk about anything less than murder. After a November 4, 1992, meeting with the undercover agents, David Price remained uninvolved until contacted by telephone by one of the agents in the middle of January, 1993.

On November 10, 1992, John Price met with the undercover agents and potential "victims" were discussed. Over the next few months there were telephone conversations between the agents and John Price, personal

conversations and letters sent by John Price to the agents. On January 27, 1993, John Price again met with the undercover agents. He was shown a photograph of a purportedly dead victim with what appeared to be a bullet hole in his head, however, this was staged and no death ever occurred. Money was given to one agent and John Price was then arrested. David Price was arrested later that day in Texas.

On June 22, 1993, a jury was unable to reach a verdict and a mistrial was declared. On retrial, petitioners were convicted of conspiracy to commit murder, in violation of 18 U.S.C. § 371, and for the use of interstate commerce facilities with the intent to commit murder-for-hire, in violation of 18 U.S.C. § 1958. John Price was also convicted of solicitation, to commit a crime of violence in violation of 18 U.S.C. § 373, while David Price was separately convicted for using interstate commerce facilities with the intent to commit murder-for-hire in violation of 18 U.S.C. § 1958.

REASONS FOR GRANTING THE PETITION

This case presents several related and important issues for the Court. First, the reasoning of the court of appeals conflicts with applicable decisions of this Court on the issue of predisposition as an element of entrapment as to which the courts of appeals are also in conflict. Second, the court of appeals failed to fully consider petitioner's claims of jury misconduct and of trial court error which deprived them

of due process and a fair trial. The court's failure to apply the relevant decisions of this Court warrants the exercise of the supervisory powers of this Court. Finally, the imposition of a "cost of incarceration" fine on petitioners presents an important question of the constitutionality of such fines under the Fifth Amendment guarantee of due process and the Eighth Amendment prohibition against excessive fines. The courts of appeals are in conflict as to this question, as well.

1. Entrapment

This Court has consistently adhered to the view that "a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct." *Mathews v. United States*, 485 U.S. 58, 62-63 (1988) (citing *Sorrells v. United States*, 287 U.S. 435 (1932); *Sherman v. United States*, 356 U.S. 369 (1958); *United States v. Russell*, 411 U.S. 423 (1973); *Hampton v. United States*, 425 U.S. 484 (1976)). This Court's most recent consideration of the entrapment defense focused on the second element of "predisposition". *Jacobson v. United States*, 503 U.S. 540 (1992). In *Jacobson*, this Court reiterated that a defendant's "ready response to [governmental] solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime." *Id.* at 553.

Since *Jacobson*, however, there has been continuing misunderstanding and conflict among the lower courts as to predisposition. There is conflict among the courts of appeals as to the standard or criteria for determining predisposition. This conflict has led to confusion about the temporal nature of the inquiry—whether evidence of commission of the crime after governmental inducement is sufficient to show that disposition to commit the crime existed prior to governmental contact. There is also some conflict as to whether a defendant's predisposition must be to commit the offense for which he is charged, or if it is sufficient to have only a general criminal disposition.

This case clearly illustrates the conflict that has developed among the courts of appeals and the misapplication of the standard articulated by this Court in *Jacobson*. In this case, the court of appeals conceded that government inducement was not an issue. *United States v. Price*, 65 F.3d 903, 908 (11th Cir. 1995). Instead, the question was petitioner's predisposition. *Id.* The court noted that: "To show predisposition, the government must prove beyond a reasonable doubt that 'the defendant was *actually* predisposed to commit the underlying crime absent the government's role in assisting such commission.'" *Id.* at 908 (quoting *United States v. Aibejeris*, 28 F.3d 97, 99 (11th Cir. 1994) (citing *Jacobson*, 503 U.S. at 547-49))(emphasis in original). The court concluded that, despite statements made by petitioner John Price and his co-petitioner that "suggest hesitation to go as far as murder," a reasonable jury could conclude that petitioner was predisposed based on

his "readiness and willingness to have their perceived enemies maimed or killed." *Id.*

The Eleventh Circuit has similarly construed the fact that a defendant was "ready and willing" to commit a crime as the equivalent of "predisposition" in other cases, as well. In *United States v. Brown*, 43 F.3d 618 (11th Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 309 (1995), the court noted "the continued strength of an approach focused on the defendant's readiness and willingness to commit the charged crime" after *Jacobson*. *Id.* at 624. In *Brown*, the court found that regardless of the defendant's ability to engage in criminal acts absent governmental involvement, the prompt commission of the crime at the first opportunity is enough to show predisposition. *Id.*; *see also United States v. Miller*, 71 F.3d 813, 816 (11th Cir. 1996) (citing *Brown* with approval).

At least one other circuit has squarely disagreed. The United States Court of Appeals for the Seventh Circuit has reasoned that the trend of some courts of appeals toward finding predisposition whenever the defendant is "'willing,' in the sense of being psychologically prepared, to commit the crime" cannot be squared with this Court's decision in *Jacobson*. *United States v. Hollingsworth*, 27 F.3d 1196, 1198 (7th Cir. 1994)(*en banc*). The court in *Hollingsworth* noted that *Jacobson* had not added a new element, but rather clarified the meaning of predisposition. *Id.* at 1199-1200. As Chief Judge Posner explained for the *Hollingsworth* court:

> Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. . . . The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so.

Id. at 1200.

The confusion among some courts appears to stem, in part, from the language in *Jacobson* describing the differing considerations for one who participates in a more traditional government "sting" operation, as opposed to one who is induced by the government:

> [A]n agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition.

Jacobson, 503 U.S. at 549-50. Although this Court distinguishes the case of a defendant who has been induced from one who simply avails himself of the opportunity provided by the government, some courts of appeals have improperly held the former to the standard of the latter. This Court confirmed in *Jacobson* that in the case of inducement, the burden is then on the government to show predisposition "prior to first being approached by Government agents." *Id.* at 549.

Some courts, however, have instead used the "ready commission" criteria to find predisposition, rather than limiting that to cases where there has not been government inducement. *See, e.g.*, *United States v. LaRizza*, 72 F.3d 775, 778 (9th Cir. 1995) (predisposition means the defendant is "ready and willing" to commit the crime); *United States v. Gifford*, 17 F.3d 462, 469 (1st Cir. 1994) (ready commission of the crime and "demonstrated readiness to commit a potential crime can suffice to prove predisposition"); *but see United States v. Gendron*, 18 F.3d 955, 963 (1st Cir.) (question should be how defendant would have reacted to an ordinary opportunity to commit the crime, rather than "concluding automatically, simply from the fact that the defendant committed the crime, that he was 'predisposed' to commit it"), *cert. denied*, ___ U.S. ___, 115 S. Ct. 654 (1994); *Cf. Hollingsworth*, 37 F.3d at 1200 (for traditional targets of stings, "willingness to violate the law without extraordinary inducements" shows predisposition; standard is different when "defendant is not in position without the government's help to become involved in illegal

activity").

This misapplication of the *Jacobson* holding also results in conflict among the courts regarding the appropriate time frame for determining predisposition. In *Jacobson*, this Court again emphasized that the relevant inquiry is the defendant's predisposition "prior to first being approached by Government agents." 503 U.S. at 549. While relevant evidence of predisposition may include the defendant's conduct both prior to and after contact with the government, it must be clear that the defendant's disposition to commit the crime was present before the contact. *Id.* at 553.

In petitioners' case, the court of appeals did not discuss in any detail the timing aspect of the determination of petitioners' predisposition. There is no evidence of any action or statements by petitioner, John Price, prior to his first meeting with the government's agent, and the evidence after that contact shows that he did not initially want to "go as far as murder." *Price*, 65 F.3d at 908. It was only after inducement by the government's agent that John Price showed a disposition to commit the crime charged. By ignoring this distinction and focusing only on whether John Price was "ready and willing" to commit the crime, the court misapplied this Court's holding in *Jacobson*. In fact, the Eleventh Circuit has repeatedly held, both before and after *Jacobson*, that the government "need not produce evidence of predisposition prior to its investigation," *Brown*, 43 F.3d at 625 (citations omitted), and that predisposition may be demonstrated by the ready commission of the crime alone,

Miller, 71 F.3d at 816. Other circuits have demonstrated similar confusion. *See, e.g.*, *Gifford*, 17 F.3d at 469 (the critical time is in advance of the government's initial intervention, but a demonstrated willingness to commit the potential crime may be sufficient).

Finally, the "ready and willing" standard improperly overlooks yet another important element of predisposition articulated in *Jacobson*— that the defendant must be predisposed to commit the crime charged. *See Jacobson*, 503 U.S. at 553 (ready response of petitioner does not establish that he was predisposed to commit the crime with which he was charged, receiving child pornography through the mails). In this case, the court specifically noted that petitioner were "reluctant" and "hesitant" to commit the crime with which they were charged— murder for hire—even after contact with the government's agent. Although John Price may have been more willing to contemplate a lesser crime, this does not equate to a predisposition to commit the crime with which he was charged. Again, the fact that he did commit the crime after government inducement is insufficient to establish predisposition under *Jacobson*. Id. [2], [3]

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[2] Even the *Brown* court recognized that the Eleventh Circuit pattern jury instruction on entrapment could be misleading to a jury and noted that other circuits have clarified their entrapment jury instructions in light of *Jacobson*. 43 F.3d 628, n.8.

[3] The court below affirmed the jury instruction given in this case which did not charge the jury to gauge petitioners' disposition as it existed prior to on otherwise law abiding citizen first being approached by government agents. *See United States v. Mkhsian*, 5 F.3d 1306

Because the court of appeals misapplied the standard for predisposition as articulated by this Court in *Jacobson*, and because of the conflict among the other courts of appeals about the proper application of the *Jacobson* standard, this Court should grant Petitioner's request for certiorari on this question.

2. Jury Misconduct and Bias

Following their convictions petitioners moved for a new trial and sought relief from Local Rule 9 (Appendix H) in order to conduct interviews with jurors. The motion for permission to interview jurors was supported by affidavits of individuals who set forth colorable claims of juror misconduct.[4] The court denied petitioners' request to interview the jurors. Juror examination was conducted by the court, even though counsel had requested leave to

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3 (cont'd) (9th Cir. 1993) (post *Jacobson* instruction on entrapment must clearly inform jury that disposition must be measured prior to defendant's encounter with government agents). The trial court also failed to clearly inform the jury that petitioners' ability to engage in the charged activity must be proved beyond a reasonable doubt and be separate and independent of government intervention. Appendix M (excerpts from court's entrapment charge). That instruction is required in order to protect "an otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law...." 503 U.S. at 553-554.

4 The petitioners' motions to interview the jurors alleged that a juror from the first trial had spoken to the second trial jurors while the jurors were hearing the case. In addition, petitioners made allegations, supported by affidavits to the defense and FBI, that one juror remarked to his employer he had prejudged the case.

examine each juror.[5] As the only means of participating, the defense was required to write out any questions prompted by witness responses during the court's examination of the jurors. Those questions were required to be handed to the court for its determination of whether the proffered questions would be asked and many of them were not posed. This procedure was the extent of petitioners' participation in the individual examination of the former jurors, except counsel were allowed to question one witness, a spouse of a former juror.

Juror number 10 admitted that his supervisor did question him about the length of his jury service, but denied that he told the supervisor he and the other jurors had prejudged the case. Compromising the potential for this juror's candor, the prosecutor inferred in the presence of juror number 10 that there may be a "potential prejudice" to the juror regarding his testimony. A sidebar conference was then held where potential contempt charges were discussed. Adding to feelings of uneasiness, the court let it be known to the jurors that the defendants had requested this hearing and that the press was present in the courtroom. There was testimony from former jurors that should have been of great

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[5] The court's juror interrogation was to be conducted *in camera*, however, when the time for the examinations arrived the court permitted members of the press to be present throughout the examination. Petitioners' objection and motion to allow members of the public to be present in light of the ability of the press to attend was denied.

concern to the court.[6]

Juror number 4 was called for her examination and from the start candidly admitted that she had not followed the court's admonition, given repeatedly during the course of the trial, not to discuss the case with anyone. She disclosed that she talked about the case with her husband, telling him that she "was shocked at what [she] heard in the case, very shocked" She also told her husband that the petitioners "are really mean."

Juror number 4 also revealed that she had made up her mind about the guilt of petitioners before the close of evidence and the court's charge. The court's method of

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[6] Juror number 1 testified that during the trial she told her husband she was "a little bit afraid" because there were "some thug-looking people out in the audience." Her husband told her they worked for defendants and were not thugs and she no longer felt threatened, but she testified that she "always had a little eerie feeling, to be honest."

Juror number 2 revealed that she "tried" to keep an open mind, but counsel was not allowed to adequately pursue the matter.

Juror number 15, who sat on the mistrial jury, had unexplained contact with the prosecutors after both trials:

> "Mr. Teschner apprized [sic] me of the fact that I would be subpoenaed so that it would not take me by surprise."
>
> "I spoke to the two prosecuting attorneys ...after the first trial and after the second trial."

questioning caused the juror to back away from the certainty of her disclosure. The defense objected to the court's method and again sought leave to directly question the former juror. That leave too was denied.

Another troubling revelation was made by juror number 4 during her examination and that concerned contact by that juror with the FBI case agent and main witness. She disclosed that she approached that witness to tell him how brave she thought he had been. This contact between the government case agent and the juror was neither brought to the court's attention nor to the petitioners' attention, despite the great care and caution taken by the court to ensure that no contact between jurors and others occurred.

That the potential for juror contact was a concern at trial is an understatement. Once the juror's contact with the FBI agent, the chief government witness, came to light petitioners moved to have the agent appear and testify. The district court denied the motion to require the agent's appearance and testimony. By refusing that request, the court, as it did with its questioning of the misbehaving juror, again abdicated its responsibility to conduct a full and fair inquiry into misconduct which strikes at the core of the jury system.

When possible juror partiality is shown, a hearing should provide a defendant with "the opportunity to prove actual bias ... in a hearing with all interested parties permitted to participate." *Smith v. Phillips*, 455 U.S. 209,

215 (1982). The defendant should be "'free to show the existence of actual bias'", *id.*, quoting *Dennis v, United States*, 339 U.S. 162, 167 (1950), because "'the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'" *Id.* Impartiality is a state of mind and a full inquiry as to the actual bias of a juror should be permitted. See *United States v. Wood*, 299 U.S. 123, 145 (1936). Similarly, in *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), the Court found a violation of the confrontation clause where one was prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of bias.

To make matters even worse, petitioners were bound and shackled in full view of the former jurors and the intimidating atmosphere of the great number of marshals present for "security" purposes added to an air of fear. This was even more palpable when each juror, at the close of his questioning, was told he could be escorted to their vehicle individually by U.S. Deputy Marshals. The presence of the press transformed the "*in camera*" proceeding into a public spectacle which discouraged witness forthrightness.

Instead of endeavoring to learn the full extent of the misconduct, the trial court's actions appeared to have frustrated the search for truth. This is amply shown by the court not permitting the defense to develop the misconduct by cross examination.

Indeed, the right to trial by a jury able to decide a

case free from bias and prejudice, based solely on the evidence is a cornerstone of our system of justice. See, e.g., *Irvin v. Dowd*, 366 U.S. 717 (1961). The Fifth Amendment's due process clause is also implicated by the actions and behavior of juror 4 since"[A] fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955). As the Court declared, "fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Id.*

The district court conducted an inquiry and learned that a juror that served was biased and had ceased being impartial. That disclosure was made after the trial was concluded, at a time when the court could not cure the problem. Had the information been revealed during the trial, the court could have engaged in a variety of remedial measures, from strong admonitions to replacement of the offending juror with an alternate under Fed.R.Crim.P. 24(c). Since the information about the juror did not surface until after the trial, the court was unable to employ any remedial devices to rectify the fair trial violation. "Even if there is no showing of actual bias in the tribunal... due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972). Here, actual bias by juror 4 was shown.

It is clear from the record that the government was aware of the contact between the agent and juror 4 before

the hearing on September 16. It is equally clear that the prosecutor never brought the information about the contact to the defense or the court. What is abundantly clear is that the government prosecutors had no intention of disclosing the contact and would have been content had the information about it never surfaced. Such action demeans the office of the United States Attorney and subverts the role of the prosecutor.

When information which may cast doubt upon the impartiality of a juror is known by the prosecution, that information must be disclosed to the court for such information goes directly to a defendant's due process right to a fair trial, *Peters v. Kiff*, 407 U.S. at 501, thus implicating "the critical importance of protecting the integrity of the trial process." *United States v. Rattenni*, 480 F.2d 195, 198 (2d Cir. 1973) (Clark, J. sitting by designation). It is of no moment to contend that the prosecutor did not purportedly learn of the contact until after the trial. The contact occurred during the trial and involved the former juror and the lead prosecution witness, a veteran of twenty plus years of FBI service. The possession of the information concerning the contact is chargeable to the government. As the former Fifth Circuit has noted, "this court has declined to draw a distinction between different agencies under the same government, focusing instead upon the 'prosecution team' which includes both investigative and prosecutorial personnel." *United States v. Antone*, 603 F.2d 566, 569 (5th Cir. 1979).

The defense in this case was entrapment. Acceptance of the defense theory depended upon credibility determinations that discounted the government's evidence. The presence of a juror who admired the chief government witness and who felt so strongly about that to actually make contact with him rendered futile any effort to successfully attack the government's case. As so observed by defense counsel Bobby Lee Cook:

> Mr. Cook: ...I can state to this Court with absolute credibility that had I known of that, that a member of this jury had approached an FBI agent involved with this case and had told him during the progress of the trial how much she admired him, that I would have moved the Court to remove that juror from the panel and to have placed an alternate in his or her place...
>
> * * * *
>
> Mr. Cook: ...I didn't come into town on a turnip truck, and I pardon the characterization...or...I didn't fall off the back end of a watermelon truck...What that's saying to me, if a juror came up to me during the trial of the case or came up to Mr. Price during the trial of the case and said I just want to tell you, Mr. Cook, how much I admire you, or I want to tell you, Mr. Price, how much I admire you, that's telling me

> something. And I think that had that happened to me...I would have had an obligation, if I understand my ethical obligations correctly, to have apprized (sic) the Court of that situation.
>
> * * * *
>
> The Court: I take it that your position is that the remarks made by the young lady, whatever they were, were endearing remarks that endorsed the Government's case.
>
> Mr. Cook: Indeed so, and that approves of the - - that approves and sanctions this witness, if it's Mr. Johnson, and that's whom I thought that it probably was, and she is congratulating him upon riding a white horse, if you please. Of course, I think's it's very, very serious proposition. And I state to the Court very frankly that I am shocked and disturbed that at this late date that we have to find out about it in a serendipitous way as opposed to having been informed by Government at some time prior to this or the Court having been informed, I consider it highly inappropriate.

Any contact by a juror and a third party is presumptively prejudicial. *Remmer v. United States*, 347 U.S. 227, 229 (1954). The trial court made a finding that

prejudice was presumed in this case but was rebutted by the government. The trial court abused its discretion in making that finding because the government rebuted nothing.

Juror 4's comment concerning the contact with the FBI case agent is not innocuous, as the trial court held. While the former juror stated, "I didn't discuss the trial", it is not clear that she did not tell the agent she admired him. The court did not follow up on that area of disclosure and petitioners' counsel were not permitted to directly examine the former juror, even though the opportunity was sought. The trial court's conclusion that juror 4 did not discuss the case is plainly incorrect. The testimony of the husband of juror 4 clearly shows that because the husband testified that his wife did tell the chief FBI agent her feelings: "She was just telling him she thought he was real brave to be involved with this mess where it was so much danger." The trial court again tried to dilute the response: "that's what she *wanted* to tell him?" (emphasis added). The witness held firm by replying: "that's what she *was* telling --"(emphasis added) and the court cut him off. It is extremely likely that juror 4 would not have viewed informing the undercover FBI agent in this case of her admiration for him as "discussing the case" since an expression of admiration would not necessarily involve any discussion of the evidence. Given the nervousness and apprehension[7] demonstrated by juror

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[7] Juror number 4 testified that she felt like she was being "tricked" by the questioning of her during the jury investigation and felt like she was being "entrapped."

4 at the September 16 hearing, it is entirely likely that she did commend the FBI agent during trial. The record demonstrates only that juror number 4 believes she did not "discuss the case" with the agent. Unfortunately, no further development of that fact was pursued or permitted by the court.

Actual bias on the part of juror number 4 was clearly demonstrated, even with the trial court's failure to fully explore it. Her disregard of the court's instructions not to discuss the case, even with spouses, to keep an open mind and her undisclosed contact with the chief government witness all show that juror number 4 was not impartial. Her lack of impartiality was prejudicial to the petitioners because it deprived them of their due process right to a fair trial. "The truth pronounced by Justinian more than a thousand years ago that, 'Impartiality is the life of justice,' is just as valid today as it was then." *United States v. Brown*, 539 F.2d 467, 469 (5th Cir. 1976). The severe violation of the fundamental right to a fair trial cries out for this Court to set this case for review.

3. The Attorney General's Undercover Guidelines

During the course of the trial the defense cross examined the chief government witness, an undercover FBI agent, on the issue of the improper conduct of the undercover operation in this case. In order to expedite the cross examination of the witness, the court informed counsel that a copy of the Attorney General's Guidelines for

Undercover FBI Operations (hereinafter guidelines) would be placed into evidence. In reliance upon that ruling defense counsel ceased their cross examination of the FBI agent on that matter and moved to another topic. At a later time, after the close of all of the evidence and prior to closing arguments, the government objected to the guidelines being placed in evidence as an exhibit.

The court changed its mind and decided that under *United States v. Evans*, 910 F.2d 790 (11th Cir. 1990), *aff'd on other grounds*, 504 U.S. 255 (1992), that the admission into evidence of the guidelines was erroneous. It determined that *Evans* mandated the withdrawal of the guidelines from evidence. *Evans* merely held that not allowing the guidelines into evidence was not an abuse of discretion.[8] Since *Jacobson*, the *Evans* decision about the guidelines must be seriously questioned as having any further vitality because the question of predisposition must be evaluated at a time prior to and independent of contact with the government agent. If the guidelines are violated in an undercover operation and entrapment is the defense, the guidelines are indeed relevant on both the issue of inducement and predisposition. Where the government agent improperly induced one who was not predisposed prior to contact to engage in criminal activity, failure to adhere to the

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[8] *Evans* was decided before *United States v. Jacobson*, 503 U.S. 540, (1992). In *Jacobson* this Court noted that the guidelines would likely be relevant when it cited them in its discussion on predisposition. 503 U.S. at 549, n.2. The relevance of the guidelines in this case cannot be seriously disputed.

guidelines would certainly be relevant to the question of whether an agent of the government "originate[d] a criminal design, implant[ed] in an innocent person's mind the disposition to commit a criminal act, and then induce[d] commission of the crimes so that the Government may prosecute." *Jacobson*,503 U.S. at 548 (citations omitted).

In reliance upon the trial court's ruling concerning the guidelines, defense counsel moved on to another topic during cross examination. In effect, counsel was relying upon the presence of the guidelines in evidence as an area that would not need further exploration on cross examination in order to be able to argue the government's failure to adhere to the guidelines as part of its theory of defense. When the district court removed the guidelines from evidence after the close of all testimony, the petitioners were effectively denied the opportunity to cross examine the witness in violation their Sixth Amendment rights and the court emasculated a part of the defense theory of the case since it prohibited the defense from referring to the guidelines. That the guidelines were relevant to a portion of the defense theory of the case is readily apparent since the defense attacked the reliability of Bobby Price, Jr., the government agent who induced the petitioners. Whether he was acting in accordance with established procedure was a critical element in determining whether his actions resulted in entrapment.

As this Court has held, "cross examination is the principle means by which the believability of a witness and

the truth of his or her testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The removal of the guidelines from evidence after all sides had rested effectively shut the door on a critical aspect of the defense case.

4. The Cost-of-Incarceration Fine

At sentencing, the trial court imposed an additional fine of $630,752.40 on John Price and $526,712.40 on David Price for the cost of their incarceration, pursuant to U.S.S.G. §5E1.2(i). The Fifth Amendment guarantees due process to criminal defendants and the Eighth Amendment prohibits the imposition of "excessive fines." The decision in the court below does violence to both of these provisions by imposing on petitioners a fine to pay for petitioners' cost of incarceration pursuant to 18 U.S.S.G. § 5E1.2(i).

There is a conflict between U.S.S.G § 5E1.2(i), which requires imposition of a fine "to pay the costs to the government of any imprisonment," and 18 U.S.C. § 3553(a), which sets forth the general factors to be considered in imposing sentence. Section 5E1.2(i) imposes an additional punishment to serve a goal that is not found in the Sentencing Reform Act and that is greater than necessary to satisfy the goals of the Act.

This issue was a question of first impression for the Eleventh Circuit in this case and that court recognized that other circuits are split on the question. *Price*, 65 F.3d at 909. The court held that the cost-of-confinement fines were

constitutional and relied upon the November 1994 amendments to 18 U.S.C. § 3572(a) (specifically including the expected costs of imprisonment as a factor to be considered in imposing a fine), 28 U.S.C. § 994(y) (Sentencing Commission may include a as component of fine calculus the expected costs of imprisonment), and the reasoning of the Fifth Circuit in *United States v. Hagmann*, 950 F.2d 175, 186-87 (5th Cir. 1991) (guideline using government's cost for incarceration to determine fine is not irrational), *cert. denied*, 506 U.S. 982 (1992). Reliance on the amended statutes, which became effective nine months *after* petitioners were sentenced, was improper. This is still an issue warranting this Court's attention because the statutory amendments merely authorize the court to consider the cost as a *component* of a fine, not an additional fine. Additionally, the issue of a fine being due immediately based upon prospective costs not yet incurred or that may never be incurred, for example, if one dies prior to the end of a sentence, is a continuing due process violation.

The other courts of appeals are divided on the constitutionality of "cost-of-incarceration" fines. In *United States v. Spiropoulos*, 976 F.2d 155 (3d Cir. 1992), the court concluded that such fines were impermissible because there was no specific or general provision in the Sentencing Reform Act for recouping the cost of imprisonment, and there was no reason to believe such a fine would meet the Act's goals of deterring criminal conduct, protecting the public or rehabilitating the defendant. *Id.* at 165. The court believed construing § 5E1.2 to allow for a cost-of-

imprisonment fine as a method of assessing restitution would risk violating the constitutional guarantee of due process because "the cost of a defendant's incarceration bears no apparent relationship to the amount that a particular defendant's victim has been injured." *Id.* at 167. While the court noted that its decision was "in tension" with the Fifth Circuit's reasoning in *Hagmann*, it rejected that court's analysis as "too facile." *Id.* at 167-68.

Several courts of appeals have followed reasoning similar to the court's in *Hagmann*, which concluded that the imposition of fines based on the cost of a defendant's imprisonment are permissible. *See*, e.g., *United States v. May*, 52 F.3d 885, 891-92 (10th Cir. 1995) (analyzing decisions from other circuits and concluding that cost-of-incarceration fine "accounts for the seriousness of the offense" and "is not greater than necessary"); *United States v. Leonard*, 37 F.3d 32, 39-40 (2d Cir. 1994) (recognizing split among circuits, but concluding fines are permissible); *United States v. Turner*, 998 F.2d 534 (7th Cir.) (rejecting *Spiropoulos* and finding that cost of incarceration fines were authorized because of deterrent effect), *cert. denied*, ___ U.S. ___, 114 S. Ct. 639 (1993). Other courts of appeals have recognized the conflict among the circuits on this issue, but have declined to decide the matter. *See, e.g.*, *United States v. Carrozza*, 4 F.3d 70, 83-84 (1st Cir.) (noting disagreement among circuits, but declining to answer the question), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1644 (1994).

5. Recusal

On the day before sentencing, the trial court called counsel to his office and disclosed that he had been provided with around-the-clock security protection for the two weeks prior to that day, and maybe longer, due to purported threats made upon the judge's life by one of the petitioners. The court then explained that it would not recuse itself for the sentencing scheduled for the following day, made certain findings concerning recusal and cited certain cases. The defense formally moved for recusal prior to sentencing and the court denied the motion.

Recusal was required in this instance either under 28 U.S.C. §§144 or 455. See *Liteky v. United States*, __ U.S. __, 114 S.Ct. 1147 (1994). Under *Liteky*, recusal should have been ordered because of the extrajudicial matters which came to the court's attention. After these matters became known to the court, its continuing to address matters in this case, particularly something as profound as sentencing, certainly raises an appearance of impropriety even if it did not rise to the level of actual impropriety.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Stephen R. Glassroth, Esq.
Counsel of Record for
John G. Price

Jeffery C. Duffey
Counsel of Record for
David G. Price

March 1996

APPENDIX A

FILED
Dec 14 1993
By THOMAS C. CAVER, CLERK
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	**CR NO. 93-57-N**
	)	
vs.	)	
	)	
JOHN G. PRICE and	)	
DAVID G. PRICE.	)	

MEMORANDUM OPINION AND ORDER

Now before the court is the defendants' motion for new trial, filed August 11, 1993. The defendants filed a supporting brief on October 12, 1993. The government responded with a brief in opposition to the motion on October 15, 1993. The defendants filed a brief in reply to the government's opposition on October 22, 1993. For the reasons explained below, the defendants' motion for a new trial is due to be denied.

FACTS

John and David Price were both convicted of multiple counts of using interstate commerce in the commission of a murder for hire, pursuant to 18 U.S.C. § 1958, and various other related crimes including conspiring to use interstate

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commerce for a murder for hire, aiding and abetting another in the use of interstate commerce for a murder for hire, and using the mails with the intent that another commit murder. Both defendants moved the court for a new trial based on alleged juror misconduct and further moved the court for relief from the Middle District of Alabama Local Rule 9[1] in order to interview the jurors from the second trial and one juror from the first trial.

The defendants' motion to interview the jurors alleged that a juror from the first trial had spoken to the second trial jurors while the jurors were hearing the case. In addition, the defendants made allegations, supported by an affidavit, that one juror remarked to his employer after being asked when he thought that he would complete his jury service that "it would not be much longer because he and the other jurors had their minds made up." (Cornelius Calhoun Aff. § 2).

The court denied the defendants' motion to conduct interviews of the jurors, but did conduct a full investigative hearing, questioning all the jurors from the second trial, the husband of one second trial juror, and one juror from the first trial. Although the court questioned each of the witnesses, the court took care to ask the appropriate questions which

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[1] United States District Court for the Middle District of Alabama, Local Rule 9 provides:

Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing formal petition therefor with the Court and securing the Court's permission, interrogate jurors, either in person or in writing, in an attempt to determine the basis for any verdict, rendered or to secure other information concerning the deliberations of the jury or any members thereof.

M.D. Ala. R. 9.

were submitted before and during the hearing by the defendants and the government. The court questioned each juror about whether they had talked with anyone about the trial, whether those conversations included discussions with Alice Albertson, a juror from the first trial, and whether they had listened to any media accounts of the trial. Alice Albertson, a juror from the first trial, testified that second trial or the numerical outcome of the first jury's deliberations with any of the second trial jurors. She further testified that she saw some of the jurors in the courthouse snack bar, but that she did not talk with them.

All of the second trial jurors, with the exception of Juror 4, responded in the negative to all the court's questions concerning whether they had discussed the case, been exposed to media reports, or ever said, exactly or in substance, "we have our minds made up" prior to the beginning of their deliberations.

Juror 4's testimony, however, raised serious questions to be considered by the court. From the onset, Juror 4 appeared nervous and intimidated by the court's investigative hearing. As the court questioned her, she became con-

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[2] Juror 4 testified to the following:

BY THE COURT:

Q. All right. Throughout the trial did you maintain an open mind?
A. I tried to, if that's a sufficient answer.
Q. Yes. Did you reach a decision in the trial prior to deliberating in the jury room after all the evidence and after I instructed you?
A. State that again.
Q. Did you make up your mind about the guilt or innocence prior to the time that all the evidence was in and I told you what the law was, and then you took the case to the jury room?
A. Well, yes. I mean maybe that's contradicting something I said

fused and her responses to questions were erratic.[2]

First, Juror 4 testified that she had not followed the instructions of the court and had discussed the case with her husband, who also testified at the hearing. According to her testimony, she remarked to her husband that the defendants looked "mean," and her husband did not respond to the characterization. (Tr. at 105.) Her husband, Brian Lanier, did not remember Juror 4 making that comment to her and testified that the only comment he recalled her making to him regarding the trial was that she could not talk about it. (Tr. at 164.)

Second, after initially testifying that she had made her mind up before being charged by the court and before deliberations had commenced, she testified to the following:

BY THE COURT:

Q. The questions that I asked you about -- or the answers you gave me about how you felt about the case

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before, but I feel -- I mean I am a little bit nervous.

Q. Well, explain to me what you mean. When you went into the jury room to deliberate did you have an open mind?

A. Not really, If that makes sense. I don't know.

Q. Well, you are going to have to tell me, did you make your mind up prior to the time I instructed you and prior to the time that all the evidence was in and prior to the time you went into the jury room or did you go into the jury room thinking we will deliberate and then I will reach a verdict?

A. I would have to say that I made my mind up. If that's --

Q. I want you to tell me, I can't tell you.

A. I will say yes.

Q. Tell me when your mind was made up.

A. After -- you know, during those nine days. I really--

Q. You mean after all the evidence was in?

while it was being tried, were they merely your evaluations of the evidence at that time?

A. I guess, yes.
Q. They were how you felt at that time about the case.
A. Yes.
Q. Is that a fair statement?
A. I guess it is. This is all new to me. I feel entrapped.

MR. EVANS: Your honor, just for the record I understand the Court's concern and reading of the language in those cases, but as phrased, both that question and some earlier questions to the witness, I believe were too leading and suggestive to really get her to be meaningful, and I think she has already answered the question.

THE COURT: All right. I think that we are delving into the deliberative process. I also think the law is very clear that all jurors begin to get a feel for the guilt or the innocence of any Defendant dur-

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A. Yes.
Q. Did you listen to my instructions about the law?
A. Yes, I thought I did.
Q. Did you follow them?
A. Yes. And I know you did say that.
Q. I said don't do what?
A. We were supposed to have an open mind and all that.
Q. Did you have an open mind?
A. I guess I didn't.
Q. Did you not make a final decision until after you and the other jurors had voted in the deliberation room?
A. Did I not make a final decision?
Q. Until then.
A. Well, I made my decision all along, I felt, of guilty, but I made my decision, I voted.

ing the course of a trial, and I think that -- and I find that this juror has told me that she didn't finally make her mind up until the case was all over with; is that a fair statement?

THE WITNESS: I think they are guilty, but I -- when we voted in there, when we went around the room I knew he was guilty and I said yes.

Q. That's when you finally made your mind up.

A. That's when I said. In my mind I thought it, but yes. Does that make sense?

Q. Yes, ma'am. That's when you finally made your mind up when you voted.

A. When I said yes.

Q. Is that a fair statement?

A. Yes.

(Tr. at 109-111.)

Third, Juror 4 also made a surprising revelation about an attempt she made to converse with Special Agent David Johnson of Federal Bureau of Investigation, the government's lead witness, during the course of the second trial. Juror 4 testified that she tried to approach Mr. Johnson, but he informed her that he was unable to talk with her. The colloquy at the hearing pertaining to this

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Q. In the jury room.

A. Oh, in the jury room, when they were asked, absolutely, I made a final -- I mean I did.

(Tr. at 105-7) (emphasis added).

incident is as follows:

BY THE COURT:

Q. Did you at any time speak to any member of the first trial in the restroom?

A. Not about the case. I was tired and I -- cold or something like that.

Q. Nothing about the case?

A. No, sir.

Q. Or in the coffee shop?

A. No, sir. I did go up to -- but I was going to speak to the -- the FBI, and I asked him did he have just a minute, but I will tell you the truth, I was going to tell him how I admired him during all this that took place before the trial when I saw the pictures and everything, you know what I am talking about.

Q. But you did not do so?

A. I didn't discuss the trial, no, or anything I heard, and he said I cannot talk to you, that's what he told me. Yes.

(Tr. at 104) (emphasis added). Other than Special Agent Johnson informing Juror 4 that he could not speak with her, no other contact occurred between Special Agent Johnson and Juror 4.

Discussion

A. Juror Misconduct: Extrinsic Evidence

The district court has broad discretion in choos-

ing the investigative procedure to be used in determining whether juror misconduct occurred, and only an abuse of discretion by the district court will constitute error. *United States v. Caldwell,* 776 F.2d 989, 997 (11th Cir.1985). Juror misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was prejudicial. *United States v. Brantley*, 733 F.2d 14299, 1439 (11th Cir.1984), *cert. denied*, 470 U.S. 1006 (1985). Failure to hold a hearing in cases of outside influence constitutes an abuse of discretion and is thus reversible error. *United States v. Chiantese,* 582 F.2d 974, 979 (5th Cir.1978), *cert. denied*, 441 U.S. 922 (1979) (holding that a hearing was unnecessary where a juror made a remark about the defense counsel). However, when alleged juror misconduct is the result of internal not external influences, the court may use its discretion in deciding whether to interrogate the jurors. *Grooms v. Wainwright,* 610 F.2d 344, 347-48 (5th Cir.), Cert. denied, 445 U.S. 953 (1980); *see United States v. Conover,* 772 F.2d 765 (11th Cir.1985) (holding that in a case where jurors participated in substance abuse during trial the decision to conduct a hearing was within the discretion of the court), *cert. denied*, 479 U.S. 929 (1986).

The test to determine whether misconduct arises to the level of warranting a new trial is whether or not the misconduct has prejudiced the defendant to the extent that he has not received a fair trial. *United States v. Armstrong,* 909 F.2d 1238, 1244 (9th Cir.1990) (quoting *United States v. Klee*, 494 F.2d

394, 396 (9th Cir.), *cert denied,* 419 U.S. 835 (1974)), *cert. denied,* 498 U.S. 870 (1990); *see United States v. Jones,* 707 F.2d 1169, 1173 (10th Cir.) (holding that not every incident of jury misconduct warrants a new trial), cert. denied, 464 U.S. 859 (1983). In *United States v. Bolinger,* 837 F.2d 436, 439 (11th Cir.1988), *cert. denied,* 486 U.S. 1009 (1988), the Court of Appeals for the Eleventh Circuit held that "exposure to extrinsic evidence mandates a new trial only if the evidence poses a reasonable possibility of prejudice to the defendant." *Bolinger,* 837 F.2d at 439. After the defendants have shown a reasonable possibility of prejudice, the government then bears the "burden of rebutting the presumption of prejudice which attaches when it has been shown that the jury was exposed to extrinsic evidence." *Id.*

After considering jury exposure to extrinsic evidence, if the district court concludes that no prejudice resulted from the misconduct then the conviction will stand. *United States v. Brantley,* 733 F.2d 1429, 1441 (11th Cir.1984). Furthermore, the Ninth Circuit Court of Appeals opined that "substantial weight will be given to the trial judge's conclusions as to the effect of alleged juror misconduct" and"[w]hen a wise and experienced judge, who presided at the trial and observed the jury, comes to such a conclusion, it is not for us to upset it." *Armstrong,* 909 F.2d at1244 (quoting Klee, 494 F.2d at 396).

The primary extrinsic evidence involved in this

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[3] The other allegation of extrinsic evidence included a juror telling his employer while discussing his work schedule that "it would not be

case is Juror 4's discussion of the case with her husband, Brian Lanier, who testified at the investigative hearing.[3] According to Juror 4, she told her husband one evening during the trial that the defendants' looked "mean." (Tr. at 105.) Juror 4 then testified that her husband did not respond. *(Id.)* Mr. Lanier testified about the incident telling the court that he did not remember his wife making such a comment. (Tr. at 164.) In addition, Mr. Lanier testified that the only thing he could recall his wife saying to him regarding the trial was that she could not talk about it. *(Id.)*

Because this situation involved extrinsic evidence, the court would have abused its discretion if it had declined to hold a full, investigative hearing. However, having held such a hearing in this case, the court finds that Juror 4's discussion with her husband, if it occurred and though against the orders of the court, created no reasonable possibility of prejudice to the defendants. It is unlikely, if not impossible, to divorce every juror from all contact with nonjurors which might involve some minute reference to the case over which they preside as jury members. Juror 4's general, if not ambiguous, comment to her husband about the defendants looking "mean" is an example of the de minimis contact from which it is impossible to shield jurors. Because the court finds that Juror 4's discussion with her husband was not prejudi-

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much longer because he and the other jurors had their minds made up." (Cornelius Calhoun Aff. ¶ 2.) Juror 10 vigorously denied ever making such a comment. (Tr. at 75-76, 81-82.) The court finds Juror 10's response to be credible and deals no further with the allegations about extrinsic juror misconduct in relation to that alleged incident.

cial, the incident will not support the granting of a motion for a new trial.

B. Premature Deliberations

"It is a generally accepted principle of trial administration that jurors must not engage in discussions of a case before they have heard both the evidence and the court's legal instructions and have begun formally deliberating as a collective body." *United States v. Resko*, 3 F.3d 684, 688 (3rd Cir.1993). There are a number of reasons for the prohibition of premature deliberations. According to the court in *Resko*, they are as follows:

> First, since the prosecution presents its evidence first, any premature discussion are likely to occur before the defendant has a chance to present all of his or her evidence, and it is likely that any initial opinions formed by the jurors, which will likely influence other jurors, will be unfavorable to the defendant for this reason. Second, once a juror expresses his or her view in the presence of other jurors, he or she is likely to continue to adhere to that opinion and to pay greater attention to evidence presented that comports with that opinion.... Third, the jury system is meant to involve decision making as a collective, deliberative process and premature discussions among individual jurors may thwart that goal. Fourth, because the court provides the jury with legal instruction only after all the evidence has been presented, jurors who engage in premature deliberations do so

> without the benefit of the court's instruction on the reasonable doubt standard. Fifth, if premature deliberations occur before the defendant has had an opportunity to present all of his or her evidence... and jurors form premature conclusions about the case, the burden of proof will have been, in effect shifted from the government to the defendant, who has "the burden of changing by evidence the opinion thus formed."

Resko, 3 F.3d at 689. Prohibiting premature deliberations helps protect a defendant's Sixth Amendment right to a fair trial and a defendant's right to due process of law as required by placing the burden of proving the defendant's guilt on the government. *Id* at 689-690. The Third Circuit in *Resko* went on to say that "when there are premature deliberations among jurors with no allegations of external influence on the jury, the proper process for jury decisionmaking has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." *Id.* at 690.

In *United States v. Davis*, 960 F.2d 820 (9th Cir.), *cert. denied*, 113 S.Ct. 210 (1992), the defendant argued that he had been denied his Sixth Amendment right to a fair trial because during a posttrial interview one juror stated that "from the first day I knew [Davis] was guilty." The court held that his argument was "meritless." *Davis*, 960 F.2d at 828. According to the Court of Appeals for the Ninth Circuit, the juror's comment simply reflected his personal beliefs and

evaluation concerning Davis and was insufficient to set aside a verdict. *Id.*

Moreover, in *United States v. Armstrong*, 909 F.2d 1238 (9th Cir. 1990), a juror was heard to comment after the prosecution's opening argument that the defendant was guilty. The court held that defendant was not denied a fair trial. *Armstrong*, 909 F.2d at 1244.

Lastly, in *United States v. Harris*, 908 F.2d 728 (11th Cir.1990), *cert. denied*, 498 U.S. 1093 (1991), one juror allegedly told a key government witness to "do it to him good" while the witness was proceeding to the witness stand to testify. *Harris*, 908 F.2d at 734. The Court of Appeals for the Eleventh Circuit upheld the district court's decision not to hold an investigatory hearing concerning the comment. Furthermore, they ruled that jurors naturally begin to form opinions as a case progressed. *Id.* The court went on to quote *Grooms v. Wainwright*, 610 F.2d 344 (5th Cir.1980),[4] where the Court of Appeals for the Fifth Circuit ruled that a similar juror's comment did not reflect serious prejudice "but only an objective evaluation of the evidence presented to date in the trial." *Grooms*, 610 F.2d at 348 (holding that a district court did not abuse its discretion in denying a motion for new trial where a juror remarked that "as far as I'm concerned [from]

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), the Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

what I heard already he's guilty").

Juror 4 initially testified that she had waited until deliberations began in the jury room before she made up her mind about the guilt or innocence of the defendants. (Tr. at 105.) Later in the hearing, Juror 4 testified that she had made up her mind about the guilt before the defendants finished their case and before the court instructed the jury about the applicable law. (Tr. at 106-107.) Juror 4, throughout her testimony, was intimidated by the proceedings and was visibly nervous. She became confused by what the court meant when it asked her about whether she maintained an open mind during the trial. Sensing that she was unsure of what the court meant by an "open mind," the court asked specific questions concerning whether she listened to all the evidence as presented, whether she listened to the instructions of the court, whether she listened to the deliberations of the other jurors, and whether she made up her mind while deliberating. (Tr. at 106-107.) Although her testimony was somewhat unclear, it appears that she listened to the jury instructions, that she followed them, and that she maintained an open mind until deliberations began. (Tr. at 106.) Her prior testimony to the contrary was simply a characterization of the strength of the government's case from the beginning of the trial, the evaluation of which is clearly within the prerogative, if not the duty, of a juror. The court finds that Juror 4, though confused when questioned about the trial and her impressions, maintained an open mind during the trial and that any conclusions she may have reached during the

trial were, to use the words of the court in *Grooms v. Wainwright*, "objective evaluation[s] of the evidence presented to date in the trial." The fact that she voted to acquit David Price of two counts of the indictment is strong and direct evidence that she maintained an open mind about the guilt or innocence of the defendants. In addition, the colloquy set out previously in this opinion further supports the conclusion that any confusion created by her initial testimony was dispelled at the end when she testified that she finally made up her mind when she voted. *See supra* pp. 3-4.

A juror would not be doing his or her duty unless he or she weighed each piece of evidence and evaluated its strengths and weaknesses. During that evaluation process, a juror naturally begins to form opinions. Though a juror may form a tentative opinion during trial, such a process does not mean that such opinion is not subject to change when the judge instructs the jury on the law or during jury deliberations.

The court finds that Juror 4 formed the natural opinions that would result from the presentation of strong and direct evidence, but that those preliminary opinions did not prevent Juror 4 from maintaining an open mind until the deliberation phase of the trial. Furthermore, the court finds that the defendants were not prejudiced by any premature deliberations on the part of Juror 4. The defendants' allegations and the testimony concerning Juror 4's engaging in premature deliberations were not born

out in the hearing and are not sufficient to support the granting of a motion for a new trial.

C. Unauthorized Discussion with the Special Agent

"Any unauthorized private communication between jurors and persons associated with the case is presumptively prejudicial, unless its harmlessness is or becomes apparent." *United States v. O'Brien*, 972 F.2d 12, 14 (1st Cir.1992). The burden is on the government to prove that the communication was harmless.

The United States Supreme Court held in *Smith v. Phillips*, 455 U.S. 209, 217 (1982), that since "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote... due process does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith*, 455 U.S. at 217. The Court went on to say that "[d]ue process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.; see United States v. Rowe*, 906 F.2d 654, 656 (11th Cir.1990) (holding that a comment by a juror while in the restroom that the defendants could not pay their lawyers did not create a reasonable possibility of prejudice).

In *United States v. Strickland*, 935 F.2d 822 (7th Cir.) *cert. denied*, 112 S.Ct. 324 (1991), the court held that improper, extrajudicial contact between the jury and a third party can indeed prejudice a defendant; but it does not necessarily do so in every case.

The determination of whether the contact in a given case was prejudicial or harmless lies primarily within the discretion of the court. Also, in *United States v. Castello,* 830 F..2d 99, 101 (7th Cir.1987), the court held that "harmless contact" between a juror and a security guard was not a proper ground for reversal.

In *United States v. Day*, 830 F.2d 1099, 1104 (10th Cir.1987), a juror and a federal agent, who had been sitting at the prosecutor's table during the trial, had a conversation in the restroom which consisted of the juror telling the agent that he was "sleepy" and the agent responding that the government's next piece of evidence "may put you to sleep." The court held that the conversation was merely a "casual, time-of-the-day greeting."

The facts in *Day* are very similar to the facts in the present case. Juror 4 approached a key government witness, Special Agent David Johnson, and Special Agent Johnson told her that he could not talk with her. In cases where jurors have communicated with third parties, the contact is deemed prejudicial unless the government can show that the contact was harmless. In the present case, as in *Day,* the contact did not involve the merits of the case. The attempted conversation between Juror 4 and Special Agent Johnson only involved a greeting with Special Agent Johnson politely admonishing Juror 4 that he could not talk to her. Since the contact was presumptively prejudicial, the government bears the burden of proving it was harmless. The court finds that the government has carried that burden in this case.

Therefore, the court finds that Juror 4's attempt to talk with Special Agent Johnson was harmless and not prejudicial to the defendants.[5]

The principle that a jury verdict is based solely on the evidence presented at trial is fundamental to our system of jurisprudence. Turner v. Louisiana, 379 U.S. 466, 472 (1965). On its face, Juror 4's favorable impression of Special Agent Johnson does not show bias but is merely an objective evaluation of his testimony. Moreover, this characterization is further supported by the acquittal of David Price on two counts. Though against the court's order, the court finds that the contact between Juror 4 and Special Agent Johnson was harmless and not prejudicial to the defendants. Thus, the contact is insuf-

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[5] Juror 4 testified that she wanted to tell Special Agent Johnson that she admired him for the undercover work he had done in bringing the defendants to trial. However, Special Agent Johnson did not let Juror 4 proceed, but cut her off after she initially spoke to him. Neither Special Agent Johnson nor the government knew what Juror 4 intended to say at the time of the initial contact. Because Special Agent Johnson would not let Juror 4 proceed, the government could not have reasonably known that Juror 4 intended to say something favorable about the prosecution. Indeed, the government would never have known if it had not been brought out by the investigative hearing conducted by the court.

Furthermore, the fact that Juror 4 may have admired Special Agent Johnson is of no consequence. Her characterization of a government witness was perfectly within her role as a juror. It was only her attempt to approach the witness that was improper and in violation of the court's orders, but the court finds that this violation resulted in no prejudice or harm to the defendants.

ficient to support the granting of a motion for a new trial.

Lastly, the defendants argue that the government's failure to disclose the contact between Juror 4 and Special Agent Johnson is a sufficient ground for the court to order a new trial. First, it is unclear whether the government knew about the contact. Consequently, without notice, the government would be under no duty to report the contact to the court.[6] In the alternative, even if the government had notice of the contact, the defendants have cited no controlling nor clear authority that the government had a duty to disclose such de minimis contact. The defendants have not cited any controlling authority dictating that a new trial would be required in situation where the government did not make such a disclosure. Neither the government's lack of notice nor its alleged failure to disclose the

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[6] Assistant United States Attorney Teschner, when questioned by the court, answered as follows:

BY THE COURT:

> Q. What gave you that understanding that it was Mr. Johnson?
> MR. TESCHNER: He told me yesterday, Your Honor.
> MR. COOK: I would like to know, if I may, and I am addressing the Court, when was it that Government counsel for the first time learned that, in fact, had occurred, that the agent had been approached by a juror during the progress of the case, if it was just yesterday, and if anyone on the defense or the Court had been advised of that prior to the time that it fell out of the witness.
> Q. Do you wish --
> MR. TESCHNER: Your honor, I do not -- I do remember that Special Agent Johnson did come to me, my belief, my best recollection is it was after the trial, and indicated a juror had come and

contact is sufficient to support the granting of a motion for a new trial.

Conclusion

It is within the sound discretion of the court whether to conduct an investigatory hearing concerning alleged juror misconduct. Furthermore, it is within the ample discretion of the court as to how an inquiry should be conducted. Lastly, the principle question for a court to determine is whether the defendants were prejudiced by alleged juror misconduct in any way. The court conducted a full investigation of the juror misconduct which allegedly occurred in the second trial of the defendants. It is considered judgment of the court that no material misconduct occurred and that the defendants were not prejudiced in any way. The court finds that both defendants received a fair trial along with a full measure of due process of law.

As the Alabama Court of Criminal Appeals recently opined in *Hunt v. Alabama,* No. CR 92-1300 (Ala. Crim. App. Dec. 13, 1993), "'[A] defendant is entitled to a fair trial but not a perfect one,' for there are no perfect trials." Hunt, No. CR 92-1300, slip op. at 132 (Ala. Crim. App. Dec. 13, 1993) (quoting *Brown v. United States,* 411 U.S. 223 (1973)). The court finds that the defendants received a fair trial.

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asked if she could talk to him and he refused to talk to her. But I do know that he mentioned it yesterday to me. This was not during the trial, but I cannot recall a specific date or time...

(Tr. at 153.)

For the foregoing reasons, it is CONSIDERED and ORDERED that the defendants' motion for new trial be and the same is hereby DENIED.

DONE this the 14th day of December, 1993.

(s) Ira De Ment
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

David G. PRICE, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John G. PRICE, Defendant-Appellant.
Nos. 94–6141, 94–6152.

United States Court of Appeals,
Eleventh Circuit.

Sept. 29, 1995.

Appeals from the United States District Court for the Middle District of Alabama.

Before COX, Circuit Judge, RONEY and WOOD*, Senior Circuit Judges.

PER CURIAM:

John and David Price were convicted for conspiracy, in violation of 18 U.S.C. § 371 (1988), to commit murder and for the use of interstate commerce facilities in violation of 18 U.S.C. § 1958 (1988), with the intent to commit murder-for-hire. John Price was also convicted of solicitation to commit a crime of violence in violation of 18 U.S.C. § 373 (1988), while David Price was separately convicted for using interstate commerce facilities in violation of 18 U.S.C. §

1958 (1988), with the intent to commit murder-for-hire.[1] John Price was sentenced to 360 months imprisonment and fined. David Price was sentenced to 300 months in prison and was ordered to pay fines as well. The Prices appeal, challenging their convictions and their sentences. We affirm their convictions but vacate their sentences and remand for resentencing.

I. FACTS AND PROCEDURAL HISTORY

John Price was president of Price Rubber Corporation, a business headquartered in Montgomery, Alabama. His son David managed a Texas rubber plant owned by the company. Several business-related incidents gave rise to the convictions now at issue.

Before establishing operations in Montgomery, John Price owned a rubber warehouse and distribution center in Auburn, Georgia. That facility burned in 1974, causing Price a three million dollar uninsured loss. The Prices have always believed that Auburn resident David Hawthorne was responsible for the arson. Nothing came of their suspicions for a time, however, because shortly after the fire, the Prices left Auburn and moved to Montgomery to found Price Rubber.

The Prices acquired more perceived enemies when, in 1986, Sy Shafer and Ellis Lucas sold their printing concern, Pioneer Press, to Kenny Price, John Price's nephew. Kenny was affiliated with the Prices' enterprise, and he ran the

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

[1] Both Prices were charged with tampering with witnesses, in violation of 18 U.S.C. § 1512(b)(2)(A) (1988), but were acquitted on those two counts.

printing business "parallel" to the principal rubber operation. (Gov't Ex. 6 at 17-18.) Shafer and Lucas retained Leon Capouano, a Montgomery lawyer, to handle the sale of Pioneer Press.

The acquisition proved troublesome for the Prices. The parties to the deal became involved in litigation, and ultimately Shafer and Lucas obtained a money judgment against Pioneer Press and Kenny Price. Litigation continued through 1992; Sy Shafer had filed two suits directly against John Price by the fall of 1991. Family relations turned so sour that John Price fired nephew Kenny, on the belief that he was stealing from the company. After his severance from the Price empire, Kenny became a prospective witness for Sy Shafer against his uncle.

Further problems arose for Price Rubber in 1991, when Internal Revenue Agent Dwight Huff initiated an examination of the company's tax records. Though routine, the review spanned the next two years, in part because of the failure of Price Rubber to timely provide information necessary for the audit's completion.

Not found of lawyers, John Price and his son David decided to bypass legal recourse and deal with their woes through a sinister plot to pay back their perceived enemies by hiring hitmen to wreak various degrees of havoc upon them. Bobby Price (unrelated to, but acquainted with John and David Price) was the Prices' initial contact with the underworld.[2] In November, 1991, David Price visited Bobby's auto body shop in Montgomery. At this meeting, David

[2] Bobby Price had worked for the Prices during 1983-1984 and again during 1987. During those times, Bobby knew both Prices and had become friends with David Price.

handed Bobby $2000 and instructed him to find "the right people" to blow up Leon Capouano's law office and to kill David Hawthorne in Auburn, Georgia. (R. 18 at 329.) Later, David mailed Bobby two packages which contained maps, photographs, and other information about Capouano and Hawthorne. The second parcel also contained a note indicating that David Price had two more names to add to the "hit list," apparently Kenny Price and Sy Shafer.

Meanwhile, Bobby Price was arrested July 8, 1992, for trafficking in marijuana. In exchange for a lighter sentence, Bobby struck a deal with the government, eventually providing information about the Prices' murder-for-hire plot.[3] After his agreement with the government, the federal agents orchestrated a meeting on August 14, 1992, between Bobby Price and David Price, during which David told Bobby that Kenny Price and David Hawthorne were still prime targets. David also took Bobby out to Elmore County, Alabama, to "case" Kenny's trailer. David paid Bobby $1500, and Bobby explained that he had two friends (FBI special agents) who would be willing to do these jobs for the Prices.

One week later, Bobby had a similar meeting with John Price. There, John expressed his desire to have Kenny "busted up pretty good," (Gov't Ex. 2 at 59), though he expressed hesitation about killing his nephew outright. As for David Hawthorne, John stated that "the guy needs to be rubbed out.

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[3] Bobby provided information regarding drug traders in the Montgomery area during "debriefing sessions" held in July, 1992. He did not mention John and David Price until August 4, 1992, after the debriefing agents demanded to know about phone calls made to Arlington, Texas. (R. 18 at 339-42.) Those calls were to David Price and concerned the activities at issue in this case.

No question about that." (*Id.* at 62.)[4]

By September 16, Bobby had introduced David Price to the undercover FBI agents, and meetings between the participants continued through the fall of 1992. During these meetings, the murders of Kenny Price, David Hawthorne, and Sy Shafer, as well as the bombing of Leon Capouano's law office, were planned and paid for by John and David Price.[5] Finally, John Price sent a letter to the agents in January, 1993, requesting the "well damaged carcass" of IRS agent Dwight Huff, in retaliation for the inconvenience caused by the audit of Price Rubber. (Gov't Ex. 63.)

The last meeting between the federal agents and John Price occurred on January 27, 1993, in Montgomery. There the agents told Price that the first murder, that of Sy Shafer, had been completed, and they showed him pictures of what they said was the body. John Price paid the agents $20,000 and expressed enthusiasm about the imminent success of the remaining jobs. Later that day, he and son David were arrested.

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[4] John Price was more reluctant than his son to order the murder of their targets. Instead, he graphically described how he would rather have them mutilated, so that they would have to live with the damage for the rest of their lives. Still, John Price was at best indifferent to his targets' survival: "... if [Hawthorne] should ... should die I don't give a shit... " (Gov't Ex. 2 at 66; Gov't Ex. 6 at 24-25.)

[5] The Prices' plans became more grandiose as time passed. By December, 1992, John Price sent the agents a "menu" of possible services for the agents to perform and the payments he would make for each. (R. 17 at 189-92.) Later, Price referred back to the menu to describe what he wanted done to two attorneys, Dennis Pentazis and Tim Davis, who were involved in litigation against him. (R. 17 at 198; 18 at 230.)

A grand jury in the Middle District of Alabama indicted the Prices jointly, and the case went to trial in June, 1993. The Prices were acquitted on two counts of witness tampering, but the jury was unable to reach a verdict on the other counts. As a result, a mistrial was declared as to those counts. Retrial began in July, 1993, and the jury returned guilty verdicts against both defendants on the remaining charges. The Prices filed a motion for a new trial, which alleged, among other things, that juror misconduct deprived them of a fair trial. The court questioned the jurors *in camera* to investigate the alleged improprieties, and some instances of misconduct were found. The judge ruled that none of the incidents prejudiced the defendants' rights and denied the motion for a new trial.

David Price was sentenced to a total of 300 months in prison, a period of supervised release, and was fined $726,712.40, which included a fine of $200,000 and costs of incarceration and supervision. David was also ordered to pay a $200 assessment and restitution of $350 to Leon Capouano. In calculating David Price's sentence, the court applied an upward adjustment based on its finding that he obstructed justice by giving false testimony at trial. *See* United States Sentencing Commission, *Guidelines Manual* § 3C1.1 (Nov. 1992).

John Price's sentence consisted of a total of 360 months in prison and a period of supervised release. Additionally, John Price was fined $880,752.40, comprised of a $250,000 fine and costs of incarceration and supervision. He was also ordered to pay $350 in restitution to Capouano.

In calculating both Prices' sentences, the trial judge found that a two-level upward departure was warranted

because of the racial and ethnic motivation behind the crimes, the severe psychological injury to the victims, and the threat of harm to third parties. The Prices appealed.

II. ISSUES ON APPEAL

The Prices raise several issues on appeal. They contend that: (1) the trial court's denial of their motions for acquittal was erroneous because they were entrapped as a matter of law; (2) the trial court's imposition of cost-of-confinement fines violated the Fifth and Eighth Amendments to the Constitution; and (3) the court misapplied the sentencing guidelines when it calculated their sentences.[6]

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[6] The Prices also argue that the trial court improperly denied their motions for a new trial after allegedly prejudicial juror misconduct was discovered.. They further claim that the trial court abused its discretion in the manner in which it conducted its investigation of the possible misconduct.

The Prices allege several acts and omissions by the trial court which they contend deprived them of a fair trial. They claim that: (1) the trial court's entrapment instruction was inadequate; (2) the trial court erred by removing from evidence the Attorney General's guidelines on FBI Undercover Operations; (3) the court erred by not allowing the defense to have an unredacted copy of informant Bobby Price's diary; and (4) the diary and other information were required to be disclosed under *Brady v. Maryland*, 373 U. S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They also attack the trial court's admission into evidence of a photograph containing inflammatory racial and ethnic matter, the trial court's instruction given to remedy "improper" remarks made by the prosecutor, and, finally, the judge's failure to recuse himself prior to sentencing because of death threats purportedly made by the Prices.

David Price separately argues that it was error for the district court to enhance his sentence under U.S.S.G. § 3C1.1 on the ground that Price obstructed justice by perjuring himself during the trial.

All these contentions are without merit and do not warrant further discussion. *See* 11th Cir.R. 36-1.

III. DISCUSSION

A. *Entrapment*

The Prices invite us to overturn their convictions, arguing that the district court should have granted their motions for acquittal because the government's evidence was insufficient to negate their entrapment defense. Their argument on this issue fails.

[1,2] Entrapment is generally a jury question. *United States v. Brown*, 43 F.3d 618, 622 (11th Cir.1995) (citing *Mathews v. United States*, 485 U.S. 58, 61, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988); *United States v. Costales*, 5 F.3d 480, 487 (11th Cir.1993)). Therefore, appellate review of a defendant's contention that he was entrapped as a matter of law is a sufficiency of the evidence inquiry, limited to deciding whether the evidence was sufficient for a reasonable jury to conclude that the defendant was predisposed to take part in the illicit activity. *Brown*, 43 F.3d at 622 (citing *United States v. Aibejeris*, 28 F.3d 97, 99 (11th Cir.1994)). Review is de novo, but we must view all facts and make all inferences in the government's favor. *Id.* (citing *Aibejeris*, 28 F.3d at 98). We cannot overturn a verdict if any reasonable construction of the evidence would allow the jury to find the defendant guilty beyond a reasonable doubt. *Id.* (citing *United States v. Ventura*, 936 F.2d 1228, 1230 (11th Cir.1991)).

[3, 4]A valid entrapment defense consists of two elements: government inducement and the defendant's lack of predisposition to commit the crime prior to the inducement. *Mathews*, 485 U.S. at 63, 108 S.Ct. at 886 (citations omitted). While the burden of production rests with the defen-

dant to show inducement, once that showing is made, the burden shifts to the government to prove beyond a reasonable doubt that the accused was predisposed to commit the crime. *Brown*, 43 F.3d at 623.

To establish government inducement, an "element of persuasion or mild coercion" is necessary. *Id.* In this case, there are numerous instances of government attempts to persuade or pressure John and David Price to commit the crimes they planned. For example, Bobby Price invoked his relationship with the Prices in offering to pay them back for past favors by arranging the murders of the Prices' enemies. A reasonable jury could have believed that such pressure induced the Prices to put their schemes in motion, so the court properly decided to charge the jury on entrapment.

The flaw in the Prices' argument is their contention that no reasonable jury could conclude that they were predisposed to engage in their murder-for-hire plot. They argue that they were not "disposed" to commit the crimes charged until after the initial contact with government agents. The Prices correctly assert that "one may not become unentrapped when the disposition arises after entrapment," (Appellant John Price's Br. at 24), and they claim, based on excerpts from the conversations they had with Bobby Price and the FBI agents, that they were reluctant to take part in the murder-for-hire scheme until after government persuasion.

Predisposition is "necessarily a fact-intensive inquiry because it is a subjective inquiry into a defendant's state of mind." *Brown*, 43 F.3d at 625 (rejecting five-factor list used by other circuits in reviewing predisposition in favor of case-by-case analysis). To show predisposition, the government

must prove beyond a reasonable doubt that "the defendant was actually predisposed to commit the underlying crime absent the government's role in assisting such commission." *Aibejeris*, 28 F.3d at 99 (citing *Jacobson v. United States*, 503 U.S. 540, 547-49, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992)); *see also Brown*, 43 F.3d at 624-25 (endorsing approach based on defendant's "readiness and willingness" to commit the crime; listing several "guiding principles" to use in reviewing predisposition findings, such as jury consideration of demeanor and credibility evidence).

[5] We cannot say that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that the Prices were predisposed to commit the crimes of which they were convicted. While some statements made by both John and David Price suggest hesitation to go as far as murder, there are other indications of their readiness and willingness to have their perceived enemies maimed or killed. Significantly, David Price met with Bobby Price and made the first "downpayment" for their series of "hits" in November, 1991, long before Bobby became a government agent. In negotiating with the FBI agents about their fees, both John and David Price made reference to payments previously given to Bobby. This further suggests that the Prices' disposition arose before government agents allegedly pressured them to discuss murder.

B. *Sentencing Issues*

The Prices attack several aspects of their sentences. They argue that the fines imposed to pay for costs of incarceration and supervision are unconstitutional, and they also contest the two-level upward departure that the trial judge found was merited because of the nature of the Prices'

plans and actions.

1. Cost-of-Confinement Fines

[6] The Prices argue that the fines levied upon them pursuant to U.S.S.G. § 5E1.2(i) to pay for costs of incarceration are excessive under the Eighth Amendment and violate due process under the Fifth Amendment because they are not rationally related to the purposes of the Sentencing Reform Act. The Prices argue that U.S.S.G. § 5E1.2(i), which provides for cost-of-incarceration fines, and 18 U.S.C. § 3553(a) (1988), which states that courts shall "impose a sentence sufficient, but not greater than necessary," are in conflict, since § 5E1.2(i) imposes an "additional" fine on top of the fine ranges contained in the table provided by § 5E1.2(c).[7] The government, on the other hand, asserts that the fine is neither excessive nor irrational. Such questions of law are subject to plenary review. *See United States v. Weaver,* 920 F.2d 1570, 1573 (11th Cir.1991).

[7] The validity of U.S.S.G. § 5E1.2(i) is an issue of

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[7] The Prices argue that such a fine is by definition excessive under the Eight Amendment. We reject their argument. The penalties levied on the Prices are neither excessive nor grossly disproportionate to the crimes committed, see *Alexander v. United States,* — U.S. —, —, 113 S.Ct. 2766, 2770, 125 L.Ed.2d 441 (1993); *United States v. Elkins,* 885 F.2d 775, 789 (11th Cir.1989), *cert. denied,* 494 U.S. 1005, 110 S.Ct. 1300, 108 L.Ed.2d 477 (1990), and so pass muster under the Eighth Amendment. Indeed, a fine based on a criminal's stay in prison seems to be by definition proportional to the crime committed. The Prices also argue that it is excessive to require them to pay for their imprisonment costs when they have yet to incur them. This argument is beside the point as well, since the fines are meant to penalize their criminal actions, not to pay the bills as they accrue while in prison. Also, the money will go not to their prison facilities but to the Crime Victims Fund, 42 U.S.C. §§ 10601 to 10603 (1988).

first impression in this circuit, and other circuits are split on the question. *Compare United States v. Spiropoulos,* 976 F.2d 155, 165-67 (3rd Cir.1992) (holding § 5E1.2(i) to be inconsistent with Sentencing Reform Act while avoiding due process question) *with United States v. Hagmann,* 950 F.2d 175, 187 (5th Cir.1991), *cert. denied,* —— U.S. ——, 113 S.Ct. 108, 121 L.Ed.2d 66 (1992) (finding that cost-of-incarceration fines are rational means to assist victims of crime collectively). In declaring guideline § 5E1.2(i) invalid, the Third Circuit found that the plain language of the section indicated that the fines imposed thereunder were to reimburse the government for the costs of imprisonment. *Spiropoulos,* 976 F.2d at 166. The court concluded that the Sentencing Reform Act did not authorize fines to cover costs of confinement, even though the money collected from the fines went to the Crime Victims Fund and not actually to pay for penal operations. *Id.* at 166-67.

We disagree with the assertion that Congress did not consider imposition of cost-of-confinement fines to be within the scope of the Sentencing Reform Act's goal of restitution. *See* 18 U.S.C.A. § 3572(a)(6) (West Supp.1995) (providing that courts can consider "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence" in setting amount of fine); 28 U.S.C.A. § 994(y) (West Supp.1995) (stating that Sentencing Commission may include as component of fine calculus the expected costs of imprisonment). Instead, we find *Hagmann* to be persuasive. We agree with the Fifth Circuit that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society—is a

rational means to assist the victims of crime collectively." *Hagmann,* 950 F.2d at 187.

Although the Third Circuit in *Spiropoulos* found the analysis in *Hagmann* to be "too facile," 976 F.2d at 168, *Spiropoulos* has been rejected, and *Hagmann* followed, in every other circuit that has addressed the issue. *See, e.g., United States v. Zakhor,* 58 F.3d 464, 466 (9th Cir.1995) (upholding cost of confinement fines); *United States v. May,* 52 F.3d 885, 891 (10th Cir.1995) (finding guideline rationally related to legitimate government interest); *United States v. Leonard,* 37 F.3d 32, 39 (2d Cir.1994) (citing *Hagmann* and holding § 5E1.2(i) consistent with 18 U.S.C. § 3553(a)); *United States v. Turner,* 998 F.2d 534, 538 (7th Cir.1993) (holding that § 5E1.2(i) is authorized by statute), *cert. denied,* —— U.S. ——, 114 S.Ct. 639, 126 L.Ed.2d 598 (1993). We join the other circuits that have upheld U.S.S.G. § 5E1.2(i), and we reject both constitutional challenges made by the Prices.

2. Upward Departure Granted by the District Court

The trial court found that the Prices' crimes went beyond the "heartland" of typical cases, *see* U.S.S.G. § 5K2.0, and departed upward by two levels from the applicable guidelines in calculating their sentences. (R.31 at 103.) In deciding that this case merited departure, the court found that three aspects of the Prices' activities were not adequately considered by the guidelines: (1) their extreme conduct, including the fact that harassment of Leon Capouano was motivated by racial and ethnic prejudice, and that the Prices planned to mutilate IRS agent Dwight Huff; (2) the risk of harm to innocent bystanders because of the plan to blow up

Capouano's law firm; and (3) the extreme psychological injury to Kenny Price and other victims.[8] The court treated these factors as a group, assigning no relative weight to one factor over another in making the decision to depart from the guidelines. The Prices challenge the departure, arguing that the sentencing guidelines adequately considered all aspects of their crimes, and that there was insufficient factual support for the trial court's findings. The government originally moved for a four-level departure, but on appeal urges us to affirm the two-level departure as reasonable.

[8] In sentencing determinations, a court may impose a sentence outside the range established by the guidelines, if the court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). We review such departures by applying a three-step analysis. *United States v. Dailey,* 24 F.3d 1323, 1325 (11th Cir.1994) (citing *Weaver,* 920 F.2d at 1573). We review de novo a decision as to whether the guidelines adequately consider a particular factor so as to preclude a sentencing court's reliance on it as a basis for departure. *Id.* Second, we review the factual findings underlying the trial court's decision to depart for clear error. *Id.* Finally, we review the departure itself for reasonableness. *Id.; accord United States v. Passmore,* 984 F.2d 933, 937 (8th Cir.1993) (holding that extent of upward departure is a "judgment call" by district court). We deal with each factor relied upon by the trial court in turn.

a. Extreme conduct (racial/ethnic motivation for crimes;

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[8] (R.Ex. 210 at 6 (John Price), 208 at 6 (David Price).)

planned mutilation of victims)

The Prices do not challenge the trial court's determination that racist or anti-semitic motivation for a crime was a proper basis for departure.[9] Instead, they argue that their actions were not racially or ethnically motivated, and that it was clear error for the trial court to find that they were. Our review, then, is limited to determining whether the trial court's factual findings are clearly erroneous.

[9] We find no clear error in the trial court's finding that the Prices were motivated by ethnic hatred in their harassment of Leon Capouano. While it is true that the court, as well as the government, acknowledged that two primary motivators for the Prices' conduct were greed and business litigation, the trial court concluded that racial and ethnic prejudice also played a part. *See McAninch*, 994 F.2d at 1388 (affirming trial court's conclusion that hatred was motivator of crime despite evidence that psychological problems could have been the cause). The Prices knew that Capouano was Jewish, and when they vandalized his home they painted swastikas and anti-semitic and racist remarks designed to strike at his religious heritage. The Prices also made repeated anti-semitic remarks about Capouano and Jews in general. While the Prices counter that any racist and anti-semitic con-

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[9] While we do not reach the issue here, we note that other circuits have allowed departures based on racist or anti-semitic motivation. *See e.g., United States v. McAninch*, 994 F.2d 1380, 1387-89 (9th Cir.) (holding that defendant's racist motivation is valid ground for departure because it is not otherwise treated in guidelines), *cert. denied*, — U.S. —, 114 S.Ct. 394, 126 L.Ed.2d 342 (1993); *United States v. Salyer*, 893 F.2d 113, 115-16 (6th Cir.1989) (race of victim could be considered under U.S.S.G. § 3A1.1 where defendant tailored actions to exploit special vulnerability of African-American family to cross burning).

duct was impulsive and isolated, there is evidence that the Prices put some thought into what they did and how they did it. *See United States v. Sanders*, 41 F.3d 480, 485 (9th Cir.1994) (holding that racist and anti-semitic letters, though short and simplistic, evidenced deliberation where defendant had to look up addresses and tailor each message to the group he was attacking), *cert. denied*, —— U.S. ——, 115 S.Ct. 2010, 131 L.Ed2d 1009 (1995).

[10] As for the proposed mutilation of IRS agent Dwight Huff, the Sentencing Commission did not adequately provide for such a grisly variety of the crime when it designed the applicable guidelines for conspiracy, solicitation, or murder-for-hire. *See* U.S.S.G. § 5K2.8 (allowing departure where defendant's conduct was unusually heinous, cruel, brutal, or degrading to victim). As the trial court concluded, these crimes were more depraved than the typical cases the guidelines were designed to cover, so that a departure based in part on the proposed mutilation of Huff was warranted. Further, we find no clear error in the trial court's underlying factual findings. John Price explicitly ordered Huff's "well-damaged carcass" in a taped conversation with the FBI.

b. Risk of harm to innocent third parties

[11] The trial court held that the potential for "injury even to the point of death" to a multitude of unknown victims as a result of the defendants' criminal activity was a factor not adequately considered in the applicable guidelines. (R. 31 at 104.) The factual predicate to this holding was the probability of injury to innocent bystanders had the scheme to blow up Leon Capouano's law office succeeded. The Prices argue that any risk to bystanders was already taken into account by the guidelines.

We first examine the guidelines to determine whether the district court correctly concluded that the danger to innocent bystanders from a bombing was not adequately considered. Reading U.S.S.G. § 2K1.4, we agree with the Prices that the risk of harm to third parties is already incorporated into the guideline applicable to property damage caused by explosives. The presentence investigation reports explicitly applied guideline § 2K1.4(a)(1), which provides for a greater base offense level where the crime "created a substantial risk of death or serious bodily injury *to any person other than a participant in the offense*..." (emphasis added). This includes people caught inside a building as well as bystanders injured in a blast. There may well be bombing cases involving risks to third parties of a kind outside the "heartland" of such cases. But the government points to nothing in the record demonstrating that this is such a case. As a result, we hold that the trial court misapplied the guidelines to the extent that the risk to third parties was double-counted; the court's reliance on the harm to innocent bystanders was thus misplaced as a ground for departure.

c. Extreme psychological injury to Kenny Price

[12] The Prices also challenge the court's reliance on its finding of extreme psychological harm to several of the victims, most notably Kenny Price, as a basis for upward departure. The Prices do not question the court's capacity to increase their sentences where their victims suffered severe psychological injury. *See* U.S.S.G. § 5K2.3. They only argue that the evidence introduced by the government did not show that Kenny Price or the other victims suffered an "injury much more serious than that normally resulting" from being a target for murder. *See* U.S.S.G. § 5K2.3, p.s.

Our review, then, is limited to reviewing the court's factual findings for clear error.

To be sufficiently severe to warrant a departure, there must be "a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim" likely to last for an extended duration and to manifest itself by physical or psychological symptoms, or by changes in behavior. U.S.S.G. § 5K2.3. *See United States v. Wilson,* 993 F.2d 214, 218 (11th Cir.1993) (stating that "[w]e that feelings of foolishness, anger, or disappointment are so far beyond the heartland of fraud offenses" to rise to the level of extreme psychological harm). While we have never decided the extent of harm needed to show "extreme psychological injury," other circuits have affirmed trial courts that departed from the guidelines based on factual findings similar to those in this case. *See, e.g., United States v. Anderson,* 5 F.3d 795, 804-805 (5th Cir.1993) (upholding departure based on letter of victim describing "her ordeal and its effects on her life"), *cert. denied,* — U.S. —, 114 S.Ct. 1118, 127 L.Ed.2d 428 (1994); *United States v. Miller,* 993 F.2d 16, 21 (2d Cir.1993) (upholding departure where victim was afraid to answer phone, open mail, or stay in New York area).

Upon review of the presentence investigation reports (PSIs), we cannot say that the trial court clearly erred in finding that several of the victims suffered severe psychological injuries of the type addressed by U.S.S.G. § 5K2.3. The PSIs state that this ordeal was very traumatic for Kenny Price. He attended counseling sessions, and at one point contemplated suicide. Kenny suffered from depression, and he stated that he no longer felt safe in his home or when he went anywhere. IRS agent Dwight Huff stated in the PSIs

that his whole family changed their lifestyle to be "extra cautious of their surroundings," and he also said that his children were psychologically affected. Leon Capouano and David Hawthorne installed security systems in their houses and also restricted their activities outside their homes after the incidents at issue in this case. We find no error in the trial court's reliance on this evidence of extreme psychological injury as a basis for upward departure under U.S.S.G. § 5K2.3.

d. Reasonableness of the two-level upward departure

[13] Our final task in weighing the trial court's decision to depart is to evaluate the overall departure for reasonableness. *Dailey*, 24 F.3d at 1325. The trial court did not separately assign a departure level to each ground in ordering an overall departure of two levels. In light of our determination that one of the three grounds for the departure was already considered in the relevant guidelines, we are unable to say that the overall departure would have been the same based only on the other two grounds. *See Williams v. United States*, 503 U.S. 193, 202-03, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992). Therefore, we vacate the sentence and remand to the district court for resentencing consistent with this opinion.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the Prices' convictions; we VACATE their sentences and REMAND for resentencing.

CONVICTIONS AFFIRMED; SENTENCES VACATED and REMANDED for RESENTENCING.

APPENDIX C

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 30, 1996
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 94-6141 AND 94-6152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

DAVID G. PRICE,
JOHN G. PRICE,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

ON PETITION (S) FOR REHEARING AND SUGGESTION (S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19 ___, _____ F.2d _____).

Before: COX, Circuit Judge, RONEY and WOOD*, Senior Circuit Judges

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure: Eleventh Circuit Rule 35-5), the Suggestion (s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

(s) Edward R. Cox

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

***Honorable Harlington Wood, Jr., Senior Circuit Judge for Seventh Circuit, sitting by designation.**

APPENDIX D

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JAN 30, 1996
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 94-6141 AND 94-6152

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus,

DAVID G. PRICE,
JOHN G. PRICE,
Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Alabama

ORDER:

( ) The motion of David G. Price and John G. Price for ( ) stay ( ) recall and stay of the issuance of the man date pending petition for writ of certiorari is DENIED.

(X) The motion of David G. Price and John G. Price for ( ) stay (X) recall and stay of the issuance of the mandate pending petition writ of certiorari is GRANTED to and including April 2, 1996, the stay to continue in force until the final dispo-

sition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the pre ceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

(s) Edward R. Cox
UNITED STATES CIRCUIT JUDGE

ORD-45

APPENDIX E

FIFTH AMENDMENT, U.S. CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX F

SIXTH AMENDMENT, U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

APPENDIX G

EIGHTH AMENDMENT, U.S. CONSTITUTION

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX H

MIDDLE DISTRICT OF ALABAMA

Local Rule 9

POST-VERDICT INTERROGATION OF JURORS

Attorneys, parties, or anyone acting for them or on their behalf shall not, without filing formal petition therefor with the Court and securing the Court's permission, interrogate jurors, either in person or in writing, in an attempt to determine the basis for any verdict rendered or to secure other information concerning the deliberations of the jury or any members thereof.

APPENDIX I

U.S.S.G. GUIDELINES

§5K1.2(i) Fines for Individual Defendants

(a) The court shall impose a fine in all cases,except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine.

(b) Except as provided in subsections (f) and (i) below, or otherwise required by statute, the fine imposed shall be within the range specified in subsection (c) below. If, however, the guideline for the offense in Chapter Two provides a specific rule for imposing a fine, that rule takes precedence over subsection (c) of this section.

(c) (1) The minimum of the fine range is the amount shown in column A of the table below.

(2) Except as specified in (4) below, the maximum of the fine range is the amount shown in column B of the table below.

(3) Fine Table

Offense Level	A Minimum	B Maximum
3 and below	$100	$5,000
4-5	$250	$5,000
6-7	$500	$5,000
8-9	$1,000	$10,000
10-11	$2,000	$20,000
12-13	$3,000	$30,000
14-15	$4,000	$40,000

16-17	$5,000	$50,000
18-19	$6,000	$60,000
20-22	$7,500	$75,000
23-25	$10,000	$100,000
26-28	$12,500	$125,000
29-31	$15,000	$150,000
32-34	$17,500	$175,000
35-37	$20,000	$200,000
38 and above	$25,000	$250,000

(4) Subsection (c)(2), limiting the maximum fine does not apply if the defendant is convicted under a statute authorizing (A) a maximum fine greater than $250,000, or (B) a fine for each day of violation. In such cases, the court may impose a fine up to the maximum authorized by the statute.

(d) In determining the amount of the fine, the court shall consider:

(1) the need for the combined sentence to reflect the seriousness of the offense (including the harm or loss to the victim and the gain to the defendant), to promote respect for the law, to provide just punishment and to afford adequate deterrence;

(2) any evidence presented as to the defendant's ability to pay the fine (including the ability to pay over a period of time) in light of his earning capacity and financial resources;

(3) the burden that the fine places on the defen-

dant and his dependents relative to alternative punishments;

(4) any restitution or reparation that the defendant has made or is obligated to make;

(5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct;

(6) whether the defendant previously has been fined for a similar offense; and

(7) any other pertinent equitable considerations.

(e) The amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.

(f) If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court may impose a lesser fine or waive the fine. In these circumstances, the court shall consider alternative sanctions in lieu of all or a portion of the fine, and must still impose a total combined sanction that is punitive. Although any additional sanction not proscribed by the guidelines is permissible, community service is the generally preferable alternative in such instances.

(g) If the defendant establishes that payment of the fine in a lump sum would have an unduly severe

impact on him or his dependents, the court should establish an installment schedule for payment of the fine. The length of the installment schedule generally should not exceed twelve months, and shall not exceed the maximum term of probation authorized for the offense. The defendant should be required to pay a substantial installment at the time of sentencing. If the court authorizes a defendant sentenced to probation or supervised release to pay a fine on an installment schedule, the court shall require as a condition of probation or supervised release that the defendant pay the fine according to the schedule. The court also may impose a condition prohibiting the defendant from incurring new credit charges or opening additional lines of credit unless he is in compliance with the payment schedule.

(h) If the defendant knowingly fails to pay a delinquent fine, the court shall resentence him in accordance with 18 U.S.C. § 3614.

(i) Notwithstanding of the provisions of subsection (c) of this section, but subject to the provisions of subsection (f) herein, the court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered.

Commentary

Application Notes:

1. A fine may be the sole sanction if the guidelines do not require a term of imprisonment. If, however, the

fine is not paid in full at the time of sentencing, it is recommended that the court sentence the defendant to a term of probation, with payment of the fine as a condition of probation. If a fine is imposed in addition to a term of imprisonment, it is recommended that the court impose a term of supervised release following imprisonment as a means of enforcing payment of the fine.

2. *In general, the maximum fine permitted by law as to each count of conviction is $250,000 for a felony or for any misdemeanor resulting in death; $100,000 for a Class A misdemeanor; and $5,000 for any other offense. 18 U.S.C. ¶ 3571(b)(3)-(7). However, higher or lower limits may apply when specified by statute. 18 U.S.C. § 3571(b)(1), (e). As an alternative maximum, the court may fine the defendant up to the greater of twice the gross loss. 18 U.S.C. § 3571(b)(2), (d).*

3. *The determination of the fine guideline range may be dispensed with entirely upon a court determination of present and future inability to pay any fine. The inability of a defendant to post bail bond (having otherwise been determined eligible for release) and the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine.*

4. *The Commission envisions that for most defendants, the maximum of the guideline fine range from subsec-*

tion (c) will be at least twice the amount of gain or loss resulting from the offense. Where, however, two times either the amount of gain to the defendant or the amount of loss caused by the offense exceed the maximum of the fine guideline, an upward departure from the fine guideline may be warranted.

Moreover, where a sentence within the applicable fine guideline range would not be sufficient to ensure both the disgorgement of any gain from the offense that otherwise would not be disgorged (e.g. by restitution or forfeiture) and an adequate punitive fine, an upward departure from the fine guideline range may be warranted.

5. *Subsection (c)(4) applies to statutes that contain special provisions permitting larger fines; the guidelines do not limit maximum fines in such cases. These statutes include, among others; 21 U.S.C. §§ 841(b) and 960(b), which authorize fines up to $8 million in offenses involving the manufacture, distribution, or importation of certain controlled substances; 21 U.S.C. § 848(a), which authorizes fines up to $4 million in offenses involving the manufacture or distribution of controlled substances by a continuing criminal enterprise; 18 U.S.C. § 1956(a), which authorizes a fine equal to the greater of $500,000 or two times the value of the monetary instruments or funds involved in offenses involving money laundering of financial instruments; 18 U.S.C § 1957(b)(2), which authorizes a fine equal to two times the amount of any criminally derived property involved in a money laundering transaction; 33 U.S.C. § 1319(c),*

which authorizes a fine of up to $50,000 per day for violations of the Water Pollution Control Act; 42 U.S.C. § 6928(d), which authorizes a fine of up to $50,000 per day for violations of the Resource Conservation Act; and 42 U.S.C. § 7413(c), which authorizes a fine of up to $25,000 per day for violations of the Clean Air Act.

6. *The existence of income or assets that the defendant failed to disclose may justify a larger fine than that which otherwise would be warranted under §5E1.2. The court may base its conclusion as to this factor on information revealing significant unexplained expen ditures by the defendant or unexplained possession of assets that do not comport with the defendant's reported income. If the court concludes that the defendant willfully misrepresented all or part of his income or assets, it may increase the offense level and resulting sentence in accordance with Chapter Three, Part C (Obstruction).*

7. *Subsection (i) provides for an additional fine sufficient to pay the costs of any imprisonment, probation, or supervised release ordered, subject to the defendant's ability to pay as prescribed in subsection [f). In making a determination as to the amount of any fine to be imposed under this provision, the court may be guided by reports published by the Bureau of Prisons and the Administrative Office of the United States Courts concerning average costs.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C., amendment 54); November 1, 1989 (see Appendix C, amendments 280, 281, and 302); November 1, 1990 (see Appendix C. amendment 356); November 1, 1991 (see Appendix C., amendment 384).

APPENDIX J

18 U.S.C. 3553

§ 3553 Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the

994(a)(2) that is in effect on the date the defendant is sentenced;
(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence—The Court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular

sentence, and, if the sentence–

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, and within the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall–

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order.

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

APPENDIX K

18 U. S. C. 3572

§ 3572 Imposition of a sentence of fine and related matters

(a) Factors to be considered.—In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)—

(1) the defendant's income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(7) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) Fine not to impair ability to make restitution.—If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, the court shall impose a fine or other monetary penalty only to the extent

defendant to make restitution.

(c) Effect of finality of judgment.—Notwithstanding the fact that a sentence to pay a fine can subsequently be—

(1) modified or remitted under section 3573;

(2) corrected under rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified under section 3742; a judgment that includes such a sentence is a final judgment for all other purposes.

(d) Time, method of payment, and related items.—A person sentenced to pay a fine or other monetary penalty shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments. If the court provides for payment in installments, the installments shall be in equal monthly payments over the period provided by the court, unless the court establishes another schedule. If the judgment permits other than immediate payment, the period provided for shall not exceed five years, excluding any period served by the defendant as imprisonment for the offense.

(e) Alternative sentence precluded.—At the time a defendant is sentenced to pay a fine, the court may not impose an alternative sentence to be carried out if the fine is not paid.

(f) Responsibility for payment of monetary obligation relating to organization.—If a sentence includes a fine, special assessment, or other monetary obligation (including interest) with respect to an organization, each individual authorized to make disbursements for the organization has a duty to pay the obligation from assets of the organization.

If such an obligation is imposed on a director, officer, shareholder, employee, or agent of an organization, payments may not be made, directly or indirectly, from assets of the organization, unless the court finds that such payment is expressly permissible under applicable State law.

(g) Security for stayed fine.—If a sentence imposing a fine is stayed, the court shall, absent exceptional circumstances (as determined by the court)—

(1) require the defendant to deposit, in the registry of the district court, any amount of the fine that is due;

(2) require the defendant to provide a bond or other security to ensure payment of the fine; or

(3) restrain the defendant from transferring or dissipating assets.

(h) Delinquency.—A fine is delinquent if a payment is more than 30 days late.

(i) Default.—A fine is in default if a payment is delinquent for more than 90 days. When a fine is in default, the entire amount of the fine is due within 30 days after notification of the default, notwithstanding any installment schedule.

APPENDIX L

28 U. S. C. 994 (a) & (y)

§ 994. Duties of the Commission

(a) The Commission, by affirmative vote of at lease four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of this title and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

(A) a determination whether to impose a sentence to probation, a fine, or a term of imprisonment;

(B) a determination as to the appropriate amount of a fine or the appropriate length of a term of probation or a term of imprisonment;

(C) a determination whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised release after imprisonment, and, if so, the appropriate length of such a term;

(D) a determination whether multiple sentences to terms of imprisonment should be ordered to run concurrently or consecutively; and

(E) a determination under paragraphs (6) and (11) of section 3563(b) of title 18;

★ ★ ★

(y) The Commission, in promulgating guidelines pursuant to subsection (a)(1), may include, as a component of a fine, the expected costs to the Government of any imprisonment, supervised release, or probation sentence that is ordered.

(Added Pub.L. 98-473, Title II, § 217(a), Oct. 12, 1984, 98 Stat. 2019, and amended Pub.L. 99-217, § 8, Dec. 26, 1985, 99 Stat. 1728; Pub.L. 99-363, § 2, July 11, 1986, 100 Stat. 770; Pub.L. 99-750, Title I, §§ 1006(b), 1008, Oct. 27, 1986, 100 Stat. 3214; Pub.L. 99-646, §§ 6-b), 56, Nov. 10, 1986, 100 Stat. 3592, 3611; Pub.L. 100-182, §§ 16b, 23, Dec. 7, 1987; 101 Stat. 1269, 1271; Pub.L. 100-690; Title VII, §§ 7088, 7103(b), 7109, Nov. 18, 1988, 102 Stat. 4408, 4418, 4419; Pub.L.103-322, Title II, § 20403(b), Title XXVIII, § 280005(c)(4), Title XXXIII, § 33003(f)(1), Sept. 13, 1994, 108 Stat. 1825, 2097, 2141.)

APPENDIX M

EXCERPTS FROM JURY INSTRUCTION

"[T]here is no illegal entrapment where a defendant is ready and willing to break the law," (R24-1387);

. . . .

"A defendant would not be a victim of illegal entrapment if you should find beyond a reasonable doubt that the defendant was ready, willing and able to commit the crime charged in the indictment, whenever the opportunity afforded it" (R24-1387);

. . . .

"If the evidence in the case leaves you with a reasonable doubt whether a defendant had any predisposition or intent to commit the crime, except for inducement or persuasion on the part of some government officer or agent, then it is your duty to find that defendant not guilty." (R24-1387).

. . . .

"The government therefore, or however, must prove beyond a reasonable doubt that a defendant was predisposed to commit the crime. In deciding whether a defendant was predisposed to commit the crime you should consider all of the relevant evidence before and after the initial contact by the government agent. Three of the factors you may consider in this case are (1), was the defendant ready and eager to deal in the charged crime or did the defendant exhibit reluctance? (2), You may consider post-crime statements, deeds or actions on the part of either or both defendants. (3), Ask yourself the question, did the evidence show that the defendant was given an opportunity to back out of the transaction and that he failed to do so and, as I stated to you earlier, you

may also consider--or maybe I did not state it to you earlier--you may also consider the defendants good character and reputation, his lack of a prior criminal record, his susceptibility, his state of mind in deciding the issue of predisposition." (R24-1388, 1389);

. . . .

"The government does not need to establish a reasonable suspicion of the illegal activity before instituting a sting operation" (R24-1391);

. . . .

"The law, however, does not prohibit the government from inducing bad people to commit crimes." (R24-1391);

. . . .

"The law requires that when defendant raises entrapment the government proved beyond a reasonable doubt that the defendant had the inclination to commit the crime with which he is charged and that his criminal inclination did not possibly result from the seduction of government agents." (R24-1391);

. . . .

"Where the government simply gives the defendant an opportunity to commit the crime and the defendant accommodates by committing the crime, the entrapment claim is unavailable." (R24-1391, 1392);

The defendant's objections appear in the record at R24-1259 through 1262, 1263 thru 1266, 1267, R20-1403, 1407, 1409, 1410, 1411.